

**BEFORE THE APPEALS BOARD  
FOR THE  
KANSAS DIVISION OF WORKERS COMPENSATION**

**JUDITH G. ADDISON**  
Claimant

VS.

**SUPERIOR INDUSTRIES**  
Self-Insured Respondent

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Docket Nos. **1,024,248**  
& **1,043,360**

**ORDER**

Claimant requests review of the February 23, 2011 Modification of Award in Docket No. 1,024,248 and the Award in Docket No. 1,043,360 by Administrative Law Judge Kenneth J. Hursh. The Board heard oral argument on June 7, 2011.

**APPEARANCES**

William L. Phalen of Pittsburg, Kansas, appeared for the claimant. Troy A. Unruh of Pittsburg, Kansas, appeared for the self-insured respondent.

**RECORD AND STIPULATIONS**

The Board has considered the record and adopted the stipulations listed in the Award.

**ISSUES**

The claimant filed two separate claims against respondent. Respondent did not dispute the compensability of either claim and stipulated to two separate accidents. On May 7, 2007, the parties entered into a compromise settlement of the February 28, 2003 accident (Docket No. 1,024,248) based upon an 18 percent whole person functional impairment due to injuries to claimant's cervical spine, left upper extremity and right knee. The right to review and modification as well as future medical treatment were left open.

Claimant returned to the same job she had performed when she suffered her injuries in Docket No. 1,024,248. She continued working until December 4, 2008, when the respondent's plant closed. Claimant then filed a second claim (Docket No. 1,043,360) for repetitive injuries suffered through her last day of work. She claimed injuries to her neck both shoulders, arms and hands. And because she was no longer employed she

also filed for review and modification in her first claim. The review and modification request in Docket No. 1,024,248 and the new claim in Docket No. 1,043,360 were consolidated for hearing.

In the review and modification proceeding in Docket No. 1,024,248 the Administrative Law Judge (ALJ) found claimant was entitled to permanent partial disability compensation for an 85 percent work disability based upon a 100 percent wage loss and a 70 percent task loss beginning December 5, 2008. In Docket No. 1,043,360 the ALJ found claimant sustained a 15 percent permanent partial disability to the right forearm and a 5 percent permanent partial disability to the left forearm.

Claimant requests review of the nature and extent of disability in both docketed claims. In Docket No. 1,043,360, claimant argues that her medical expert and her vocational expert each opined that she is permanently and totally disabled. Claimant further argues that her experts' testimony was uncontroverted. Consequently, she requests a finding that she is permanently and totally disabled. In Docket No. 1,024,248, claimant argues that the ALJ's February 23, 2011 Modification of Award finding claimant entitled to compensation for an 85 percent work disability should be affirmed but the ALJ erred in the calculation of benefits.

Respondent argues the presumption of permanent total disability was rebutted and the ALJ's Modification of Award and Award should both be affirmed.

The sole issue for Board review in Docket No. 1,043,360 is the nature and extent of disability. The sole issue for Board review in Docket No. 1,024,248 is whether the ALJ correctly calculated the benefits upon modification of the award to an 85 percent work disability.

#### **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings of fact and conclusions of law:

Respondent manufactured aluminum automobile wheels. Claimant's job was to check the automobile tires for leaks. The tires move from station to station on iron racks hanging from the line. Claimant would firmly grab the tire with both hands, pick up the wheel and then turn to place the tire in the leak tester. Claimant would then grab another tire and repeat the steps doing a wheel about every three seconds. Other job duties included stamping the wheel, hanging tested products, placing wheels in water for testing and offloading the wheels.

On February 28, 2003, claimant was lifting a wheel and experienced sharp pain in her neck and shoulders as well as her left arm, wrist and hand. And during the course of treatment she also complained of right knee pain from repetitiously leaning against a conveyor. Treatment for her injuries included an open left carpal tunnel release on March 11, 2005.

Dr. Edward Prostic, board certified orthopedic surgeon, examined and evaluated claimant at her attorney's request. On September 23, 2005, Dr. Prostic reviewed medical records, took a history from claimant and performed a physical examination. Claimant's left thumb was tender at the palmar pillar and of the basal joint, left lateral epicondyle was tender, the left forearm circumference was decreased compared to the right, and abnormal quadriceps angle and prominence of the infrapatellar fat pad of the right lower extremity. Dr. Prostic diagnosed claimant with status post carpal tunnel release surgery on the left, mild lateral epicondylitis of the left elbow, early degenerative disease of the basal joint in the left wrist, patellofemoral dysfunction of the right knee as well as cervical sprain and strain. The doctor opined the claimant's physical examination was consistent with the claimant's complaints of pain as well as the mechanism of her work-related injury on February 28, 2003. The doctor recommended anti-inflammatory medicines by mouth and progressive-resistive exercises for her leg.

On September 25, 2006, Dr. Prostic updated claimant's medical history. An MRI had been performed on claimant's cervical spine which revealed a left-sided C5-6 disk herniation with central stenosis, moderate in severity. Claimant had been provided physical therapy and a Functional Capacity Assessment Evaluation (FCE). She was returned to work with a 25-pound lifting restriction.

Based upon the AMA *Guides*<sup>1</sup>, Dr. Prostic opined claimant has a 15 percent permanent partial functional impairment to her cervical spine, 10 percent to the left upper extremity due to residuals of carpal tunnel surgery and 5 percent to the right leg due to patellofemoral dysfunction. These impairments combined for a 22 percent functional impairment to the body as a whole.

As previously noted, the parties then entered into a compromise settlement of the February 28, 2003 date of accident (Docket No. 1,024,248) based upon an 18 percent whole person functional impairment with the right to review and modification as well as future medical treatment left open. Before the settlement, claimant had returned to work for respondent in an accommodated leak tester position. But after she was released to return to full-duty work, claimant was then expected to perform all her duties as a leak tester.

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<sup>1</sup> American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are based upon the fourth edition of the AMA *Guides* unless otherwise noted.

Claimant alleged she suffered repetitive bilateral injuries to both hands, wrists, forearms and shoulders as well as her neck as she continued to work for respondent until the plant closed on December 4, 2008. Her left hand worsened and then her right hand began developing additional problems as well. The bilateral forearms and shoulders were new injuries suffered after she settled her first claim. She had increased pain in both her shoulders and forearms. Claimant's neck symptoms also had increased to constant pain. Claimant testified that she reported her worsening condition to her supervisors but they never sent her for medical treatment. Claimant further testified that she was missing some time from work because of her pain before the plant closed.

Dr. Prostin again examined and evaluated claimant on January 27, 2009. Claimant complained of pain in her wrist, forearms, shoulders and neck. She had intermittent numbness and tingling in her hands. These additional symptoms indicated that claimant's physical condition had worsened since the last evaluation. Upon physical examination, Dr. Prostin found claimant had mild synovitis of each wrist volarly, tenderness of the extensor supinator muscle at the elbows, substantial weakness of pronation and supination bilaterally, and positive right carpal tunnel syndrome. The doctor opined claimant's left upper extremity had worsened and she had developed new problems with her right upper extremity. X-rays were taken of claimant's wrists. Dr. Prostin diagnosed bilateral carpal tunnel syndrome, bilateral radial nerve entrapment and also injury to her cervical spine. An EMG was recommended as well as decompression surgery. The doctor opined that claimant's injuries were caused or contributed to by her work activities she performed for respondent through December 4, 2008.

Dr. Prostin performed a supplemental medical examination of claimant on May 3, 2010. Claimant continued to complain of pain in both hands going up to her shoulders and then to her neck as well as pain in her elbows. Upon physical examination, claimant had painful range of motion of the left shoulder, weakness in both shoulders and some synovitis of the flexor compartment of both wrists. There was a positive Tinel test at the carpal canal bilaterally and positive flexion compression median nerve testing at the right wrist. The doctor opined claimant's physical examination was consistent with her complaints of pain as well as the mechanism of her work-related injury. X-rays were taken of claimant's cervical spine and both shoulders which revealed degenerative disc disease at C4-7 and no obvious abnormality of the shoulders. Dr. Prostin diagnosed claimant with degenerative disc disease in her cervical spine, rotator cuff irritability of both shoulders, and evidence of bilateral carpal tunnel syndrome.

Based on the *AMA Guides*, Dr. Prostin rated claimant's cervical spine at a 15 percent whole body impairment, 10 percent to each upper extremity for rotator cuff disease and 15 percent to each upper extremity for carpal tunnel syndrome. The doctor opined claimant had an additional 5 percent impairment for the left upper extremity and the 15 percent to the right upper extremity was a new impairment. Claimant's shoulders were

given a 10 percent impairment due to rotator cuff disease which is an additional 10 percent to each extremity.

Dr. Prostic testified:

Q. So for the benefit of the administrative law judge, what would the new impairment rating be for the injury each and every working day ending on or about December 4th, 2008? It would be 15 percent on the right for the right carpal tunnel and 10 percent for the right rotator cuff disease, correct?

A. Yes.

Q. And then on the left, it would be 5 percent for the carpal tunnel and 10 percent for the rotator cuff disease; is that correct?

A. Yes.

Q. Out of an abundance of caution, first, can you combine your entire impairment rating that you've given here today, the 15 percent to the body for the cervical spine, the 10 percent for each upper extremity for the rotator cuff disease and 15 percent for the re-occurent carpal tunnel?

A. The total impairment is 38 percent of the body as a whole according to the combined values chart of the AMA Guides, Fourth Edition.

Q. And if we kept just comparing body as a whole, your previous rating for the initial work injury was 22 percent?

A. Yes.

Q. And so we would have 16 percent new body as a whole impairment?

Yes.<sup>2</sup>

Dr. Prostic imposed restrictions against repetitious forceful gripping or twisting or use of vibratory equipment with either hand. She should only do minimal activities with either hand above shoulder level.

Dr. Prostic reviewed the list of claimant's former work tasks prepared by Ms. Karen Terrill and concluded claimant could no longer perform 25 of the 37 tasks for a 68 percent task loss. The doctor further opined that based on claimant's age, education and work

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<sup>2</sup> Prostic Depo. at 29-30.

history, claimant is incapable of performing substantial gainful employment as a result of her work-related injuries on December 4, 2008.

After the plant closed, the claimant began drawing unemployment benefits. She is 66-years old and eligible to draw Social Security retirement benefits. She applied for work at the library, Census, Hallmark and more. But even though claimant has looked for work she testified that she does not think that she can actually work. She further testified that but for her accident she intended to continue working even after drawing her social security retirement benefits because she would have had to.

Karen Terrill, a vocational rehabilitation counselor, conducted personal telephone interviews with claimant on January 6, 2010 and January 11, 2010, at the request of claimant's attorney. She reviewed Drs. Prostic and Pang's medical reports and gathered information regarding claimant's educational background. Ms. Terrill prepared a task list of 37 nonduplicative tasks claimant performed in the 15-year period before her injury. At the time of the interview, claimant was not working and therefore had a 100 percent wage loss. A follow-up interview occurred on April 15, 2010, to discuss claimant's light-duty job and then add any additional job tasks in a subsequent report. Based on claimant's education, work background and restrictions, Ms. Terrill opined claimant was permanently, totally disabled from performing substantial gainful employment in the open labor market.

### **Docket No. 1,024,248**

This claim was settled and claimant returned to work for respondent until the plant closed. She then filed for review and modification as that right was left open in her settlement. Because she had returned to work her settlement was based upon her whole body functional impairment as she did not qualify for a work disability at that time.<sup>3</sup> Upon the loss of her job claimant argued she was entitled to a work disability. The ALJ agreed and awarded claimant an 85 percent work disability commencing December 5, 2008.

The respondent did not dispute this finding and requested the Board to affirm the Modification of Award. The claimant likewise requested the Board to affirm the work disability but disputed the ALJ's calculation of benefits. Consequently, the Board affirms the ALJ's finding claimant suffered an 85 percent work disability commencing December 5, 2008.

Turning to the recalculation of the benefits for the 85 percent work disability, in order to clarify the amounts due under the ALJ's Award, the Board notes that the calculation of an award where there is a change in the disability percentage requires the award be calculated as if the new percentage was the original award, thereafter, the number of

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<sup>3</sup> See K.S.A. 44-510e(a).

disability weeks obtained in the recalculation is reduced by the prior permanent partial disability weeks already paid or due. But the Workers Compensation Act provides that only 415 weeks of benefits following the date of injury are payable for temporary and permanent partial general disability benefits. K.S.A. 44-510e(a) provides, in part:

If the employer and the employee are unable to agree upon the amount of compensation to be paid in the case of injury not covered by the schedule in K.S.A. 44-510d and amendments thereto, the amount of compensation shall be settled according to the provisions of the workers compensation act as in other cases of disagreement, except that in case of temporary or permanent partial general disability not covered by such schedule, **the employee shall receive weekly compensation as determined in this subsection during such period of temporary or permanent partial general disability not exceeding a maximum of 415 weeks. . . . In any case of permanent partial disability under this section, the employee shall be paid compensation for not to exceed 415 weeks following the date of such injury, subject to review and modification as provided in K.S.A. 44-528 and amendments thereto.** (Emphasis added.)

And in this case the 415-week period following claimant's February 28, 2003 accident expired on February 11, 2011.

Consequently, the recalculation of the award begins with determination of the number of disability weeks payable by subtracting from 415 weeks the total number of weeks temporary total disability compensation was paid. The first 15 weeks of temporary total disability compensation is excluded. The remainder is multiplied by the percentage of permanent partial general disability.<sup>4</sup> Herein, the parties stipulated that no temporary total disability compensation had been paid. Accordingly, 415 weeks would be multiplied by the 85 percent work disability. Such calculation results in 352.75 weeks for which work disability compensation is payable. The weeks of previously paid permanent partial disability must be deducted from the weeks payable determined in this new calculation.

The weeks payable for the 18 percent functional impairment calculate to 74.70 weeks which were all due and payable before the December 5, 2008, start of the work disability benefits. From the 352.75 weeks for the work disability, the prior 74.70 weeks of paid functional disability would be deducted resulting in a total of 278.05 weeks payable. But as previously noted, permanent partial disability can only be paid for a maximum of 415 weeks from the date of the accident. From the change in claimant's disability to a work disability on December 5, 2008, until the expiration of 415 weeks on February 11, 2011, there would only be 114 weeks that additional permanent partial disability benefits could

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<sup>4</sup> K.S.A. 44-510e(a)(2).

be paid.<sup>5</sup> Accordingly, claimant is entitled to an additional 114 weeks of permanent partial disability benefits at the \$338.34 compensation rate or \$38,570.76 which is all due and owing. The ALJ's Modification of Award is modified to correct the calculation of benefits but affirmed in all other respects.

**Docket No. 1,043,360**

It was undisputed claimant suffered repetitive trauma injuries at work through December 4, 2008. And it was further uncontroverted that as a result of those injuries she suffered bilateral upper extremity injuries. In *Casco*<sup>6</sup> it was stated:

Scheduled injuries are the general rule and nonscheduled injuries are the exception. K.S.A. 44-510d calculates the award based on a schedule of disabilities. If an injury is on the schedule, the amount of compensation is to be in accordance with K.S.A. 44-510d.

When the workers compensation claimant has a loss of both eyes, both hands, both arms, both feet, or both legs or any combination thereof, the calculation of the claimant's compensation begins with a determination of whether the claimant has suffered a permanent total disability. K.S.A. 44-510c(a)(2) establishes a rebuttable presumption in favor of permanent total disability when the claimant experiences a loss of both eyes, both hands, both arms, both feet, or both legs or any combination thereof. If the presumption is not rebutted, the claimant's compensation must be calculated as a permanent total disability in accordance with K.S.A. 44-510c.

When the workers compensation claimant has a loss of both eyes, both hands, both arms, both feet, both legs, or any combination thereof and the presumption of permanent total disability is rebutted with evidence that the claimant is capable of engaging in some type of substantial and gainful employment, the claimant's award must be calculated as a permanent partial disability in accordance with the K.S.A. 44-510d.<sup>7</sup>

Under the *Casco* analysis the calculation of claimant's benefits begins with a determination of whether the claimant has suffered a permanent total disability. And because in this case the claimant has suffered permanent impairment to both upper extremities there is a presumption of permanent total disability.

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<sup>5</sup> In the body of the Modification of Award the ALJ noted that there were only 115 weeks remaining but in the compensation paragraph used 97.75 weeks.

<sup>6</sup> *Casco v. Armour Swift-Eckrich*, 283 Kan. 508, 154 P.3d 494, rehearing denied (May 8, 2007).

<sup>7</sup> *Casco v. Armour Swift-Eckrich*, 283 Kan. 508 at Syl ¶ 7-9.



Both Dr. Prostic and vocational expert Karen Terrill opined that claimant was permanently, totally disabled from performing substantial gainful employment in the open labor market. Although the claimant conducted a limited search for work after December 2008, she noted she did not think there was any job she could perform. No contradictory evidence was provided.

The ALJ did not find the testimony of the medical experts persuasive because claimant had worked while injured. The Board disagrees. After claimant settled her first claim she did return to work but it is undisputed that as she continued working she sustained new injuries. And it is the new permanent injuries suffered in this claim that raised the presumption of permanent total disability. Ms. Terrill provided a detailed explanation of the reasons why claimant would be unable to engage in substantial gainful employment including claimant's age, lack of transferrable skills and the fact that any work requires the ability to utilize your hands in an effective manner and Dr. Prostic's restrictions limited claimant's ability to do so. Again, there was no evidence offered to rebut the presumption and instead all of the uncontroverted evidence corroborated the presumption and established claimant was unable to engage in substantial gainful employment. Accordingly, the Board modifies the ALJ's Award to find claimant is entitled to compensation for a permanent total disability.

As required by the Workers Compensation Act, all five members of the Board have considered the evidence and issues presented in this appeal.<sup>8</sup> Accordingly, the findings and conclusions set forth above reflect the majority's decision and the signatures below attest that this decision is that of the majority.

**AWARD IN DOCKET NO. 1,024,248**

**WHEREFORE**, it is the decision of the Board that the Modification of Award of Administrative Law Judge Kenneth J. Hursh dated February 23, 2011, is modified to correct the calculation of benefits but is affirmed in all other respects.

Claimant is entitled to 114 weeks of permanent partial disability compensation at the rate of \$338.34 per week for a total of \$38,570.76 which is ordered paid in one lump sum less amounts previously paid due to an 85 percent work disability beginning December 5, 2008.

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<sup>8</sup> K.S.A. 2010 Supp. 44-555c(k).

**AWARD IN DOCKET NO. 1,043,360**

**WHEREFORE**, it is the decision of the Board that the Award of Administrative Law Judge Kenneth J. Hursh dated February 23, 2011, is modified to find claimant is entitled to compensation for a permanent total disability.

Claimant is entitled to permanent total disability compensation at the rate of \$323 per week not to exceed \$125,000 for a permanent total general body disability.

As of June 30, 2011, there would be due and owing to the claimant 134 weeks of permanent total disability compensation at the rate of \$323 per week in the sum of \$43,282 for a total due and owing of \$43,282, which is ordered paid in one lump sum less amounts previously paid. Thereafter, the remaining balance in the amount of \$81,718 shall be paid at \$323 per week until fully paid or until further order of the Director.<sup>9</sup>

**IT IS SO ORDERED.**

Dated this \_\_\_\_\_ day of July, 2011.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: William L. Phalen, Attorney for Claimant  
Troy A. Unruh, Attorney for Respondent  
Kenneth J. Hursh, Administrative Law Judge

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<sup>9</sup> There was no claim for a credit or offset under either K.S.A. 44-501(c) or K.S.A. 44-510a.